

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 147

NEW JERSEY REALTY TITLE INSURANCE
COMPANY, APPELLANT,

vs.

DIVISION OF TAX APPEALS IN THE DEPART-
MENT OF TAXATION AND FINANCE OF THE
STATE OF NEW JERSEY AND THE CITY OF
NEWARK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

INDEX

	Original	Print
Proceedings in Supreme Court of New Jersey	a	1
Appendix to appellants' brief	a	1
Writ of certiorari	1	1
Allocatur	2	2
Reasons for reversal	2	2
Return to the writ	4	3
Proceedings before Division of Tax Appeals, Depart- ment of Taxation and Finance	4	3
Petition of appeal from assessment	4	4
Schedule 1	6	5
Schedule 2	8	5
Personal Property Return of Stock Insurance Company for Year 1945 Under Section 54:4-22 of Revised Statutes	9	6
Opinion	14	10
Judgment	15	11
Transcript of hearing	16	12
Caption and appearances	16	12
Statement on behalf of petition	16	12
Testimony of Hilmer Anderson	17	13
Opinion, Heher, J.	26	19
Rule reversing judgment	30	22
Notice and grounds of appeal	31	22

	Original	Print
Opinion, Oliphant, J.	32	23
Mandate on reversal	39	28
Docket entries	40	29
Petition for appeal, assignments of error and prayer for reversal	41	30
Order allowing appeal	47	33
Citation (omitted in printing)	49	
Affidavit of Charles B. Niebling (omitted in printing)	50	
Bond on appeal (omitted in printing)	51	
Præcipe for transcript of record	53	34
Clerk's certificate (omitted in printing)	57	
Statement of points to be relied upon and designation of parts of record to be printed	58	36
Order noting probable jurisdiction	61	37

[fol. a]

IN SUPREME COURT OF NEW JERSEY

On Appeal from New Jersey Supreme Court.

Sat below: Bodine and Heher, J.J.

**NEW JERSEY REALTY TITLE INSURANCE COMPANY, Prosecutor-
Appellee,**

vs.

**DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION
and Finance of the State of New Jersey, and the City of
Newark, a Municipal Corporation, Respondents-Appel-
lants**

Appendix to Appellants' Brief

[fol. 1]

IN NEW JERSEY SUPREME COURT

WRIT OF CERTIORARI

STATE OF NEW JERSEY, ss:

The State of New Jersey to the Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey—(L.S.)

GREETINGS:

We being willing, for certain reasons, to be certified of a certain judgment of the Division of Tax Appeals in the State Department of Taxation and Finance, dated April 22, 1947, dismissing the appeal of New Jersey Realty Title Insurance Company from the assessment of \$75,700.00 levied by the City of Newark for the year 1945 on personal property of New Jersey Realty Title Insurance Company located at No. 830 Broad Street, Newark, New Jersey, do command you that you certify and send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the 2nd day of March, 1948, the said judgment of said Division of Tax Appeals, together with proceedings, testimony, exhibits and all things touching and concerning the same, as fully and completely as they remain before you, together with this our writ, that we may cause to be done

thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Honorable Clarence E. Case, Chief Justice of our Supreme Court, at Trenton, this 11th day of February, One Thousand Nine Hundred and Forty-eight.

James J. Gavin, Clerk.

Charles B. Niebling, Attorney for Prosecutor.

[fol. 2]

ALLOCATUR

This writ allowed by Opinion filed February 3, 1948.

IN NEW JERSEY SUPREME COURT

REASONS FOR REVERSAL—Filed March 10, 1948

The said prosecutor, by its attorney prays that the judgment of the Division of Tax Appeals in the Department of Taxation and Finance, dated April 22, 1947, dismissing the appeal of prosecutor from an assessment of \$75,700 levied by the City of Newark on personal property of prosecutor for the year 1945, may be set aside, reversed and for nothing holden, for the following reasons:

1. Section 54:4-22 of the Revised Statutes, as amended by P. L. 1938, c. 245, under which said assessment was made, is unconstitutional insofar as application of the proviso thereof, providing for a minimum assessment of 15 per cent of the paid-up capital and surplus of stock insurance companies, operates to impose a direct tax upon bonds of the United States owned by prosecutor, which are immune from state and local taxation.

2. Section 54:4-22 of the Revised Statutes, as amended by P. L. 1938, c. 245, under which said assessment was made, is unconstitutional in that said statute, in subjecting the intangible personal property of stock insurance companies to taxation by a special method of assessment, makes an arbitrary classification resulting in unequal and discriminatory taxation, in contravention of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of New Jersey.

3. If section 54:4-22, as amended, is invalid in its entirety, the said assessment against prosecutor is illegal and void

and should be set aside and cancelled, for the reason that prosecutor was not subject to personal property taxes by the City of Newark for the year 1945 under any applicable taxing statutes.

4. If section 54:4-22, as amended, is invalid only in respect to the operation of the proviso thereof in imposing a direct tax upon United States bonds owned by prosecutor, the judgment of the Division of Tax Appeals was erroneous in that the said assessment of \$75,700 should have been reduced by excluding and eliminating the amount of such United States bonds from the capital and surplus of prosecutor against which the 15 per cent minimum assessment was calculated.

5. The said assessment, affirmed by the judgment of the Division of Tax Appeals as aforesaid, is in divers other respects unjust, illegal and void, and should be set aside and cancelled.

Dated: March 10, 1948. —

Charles B. Niebling, Attorney for Prosecutor.

[fol. 4] IN NEW JERSEY SUPREME COURT

RETURN TO THE WRIT

The Division of Tax Appeals in the Department of Taxation and Finance doth herewith send to the Supreme Court of the State of New Jersey the petition, judgment and proceedings in the matter of the appeal of New Jersey Realty Title Insurance Company, from the assessment of personal property situate in the City of Newark, County of Essex, for the year 1945, as within it is commanded, as by the transcript under the seal of said Division hereto annexed more fully appears.

Division of Tax Appeals, By Chas. E. Cook, Secretary. (Seal.)

4

BEFORE DIVISION OF TAX APPEALS, DEPARTMENT OF TAXATION
AND FINANCE

PETITION OF APPEAL

To the Division of Tax Appeals, in the State Department of
Taxation and Finance:

Your petitioner, New Jersey Realty Title Insurance
Company residing at (P.O. address), 830 Broad Street,
Newark 1, in the County of Essex and State of New Jersey
respectfully shows that petitioner is the owner of certain
property situated in the taxing district of Newark, County
of Essex, consisting of

(See attached copy of return filed with Board of Assess-
ment and Revision of Taxes, Department of Revenue
and Finance, Newark, New Jersey, December 2, 1944)

[fol. 5] and known as

That said property has been assessed for the purpose
of taxation for the year 1945 at a valuation of * Land, — ;
Improvement, \$ — ; Personal, \$75,700.00; Total, \$75,700.00
at which assessment you- petitioner is aggrieved, because
the said assessment is in excess of its true value.

That an appeal from said assessment has been filed with
the Essex County Board of Taxation, which appeal said
Board disposed of as follows:

See copy of Determination attached hereto and in-
cluded herein and marked Schedule 1.

Your petitioner, therefore, prays that said assessment
of **Land, \$ — ; Impt., \$ — ; Pers., \$75,700.00.; Total,
\$75,700.00, for the year 1945, be reduced to the true value
of the property, to wit; Land, \$ — ; Impt., \$ — ; Pers.,
\$ None; Total, \$ None because of and for the reasons set

* This amount should be the original valuation of the
property as it appears on the tax bill.

** This amount should be the valuation to which the
assessment was changed by the County Board of Taxation,
on appeal.

forth in the schedule attached hereto and made a part hereof and included herein and marked schedule #2.

New Jersey Realty Title Insurance Company,
(Signed) Hilmer J. Anderson, Treasurer.

Dated Dec. 13, 1945.

[fol. 6] *Duly sworn to by Hilmer J. Anderson. Jurat omitted in printing.*

SCHEDULE 1

ESSEX COUNTY BOARD OF TAXATION

APPEARANCES:

For the Petitioner: James J. McCarthy, Esq., and Hilmer Anderson, Esq.

For the Respondent: Thomas L. Parsonnet, Esq., Corporation Counsel of the City of Newark, by Vincent J. Casale, Esq., Assistant Corporation Counsel.

Petitioner has filed its petition of appeal, praying exemption from assessment on personal property imposed by the taxing district of the City of Newark, on the ground that [fol. 7] the Act under which the assessment has been made by the City of Newark is unconstitutional.

We think that the application should be made to a tribunal, other than the Essex County Board of Taxation, in order to determine the constitutional question, the solution of which is the basis for the claim of the Petitioner for exemption from taxation, and the claim of the City of Newark that the tax should be imposed.

Essex County Board of Taxation, (Signed) Charles Hood, President; Max Drill, Herbert H. Eber, John F. Coogan, Jr., Joseph L. Magrino.

Dated: November 14, 1945.

(Signed) Edward D. Balentine, Secretary.

[fol. 8]

SCHEDULE 2

Petitioner is subject to no tax because as indicated by the documents hereto attached and made a part hereof its assets consist of exempt and non-taxable property. Chapter 4 of Title 54 of the Revised Statutes of New Jersey is unconstitutional in so far as it purports to provide for a

tax of not less than fifteen percentum of the sum of the paid up capital and surplus of petitioner in excess of the total of all liabilities of petitioner in that said provision in effect levies a tax upon non-taxable and exempt securities owned by petitioner and results in unequal and discriminatory taxation.

New Jersey Realty Title Insurance Company, Signed
Hilmer J. Anderson, Treasurer.

[fol. 9]

**PERSONAL PROPERTY RETURN OF STOCK INSURANCE COMPANY FOR YEAR 1945
UNDER SECTION 54: 4-22 OF REVISED STATUTES**

(As Amended by Chapter 245, Laws of 1938)

Name of Company New Jersey Realty Title Insurance Company

Address 830 Broad Street, Newark, New Jersey

1. Total Assets (including assets not admitted) (Attach Balance Sheet as Schedule A)....			\$774,972.98
Deduct:			
2. Real Estate (Book Value).....	None		
3. Tangible Personalty.....	None	None	
4. Total Intangible Assets (Item 1 less sum of Items 2 and 3).....			\$774,972.98
Deduct:			
5. All Shares of Stock (Book Value)— Schedule B.....	None		
6. Exempt and Non-Taxable Property (Book Value)—Schedule C.....			
7. Total Taxable Intangibles (Item 4 less sum of Items 5 and 6).....	\$770,454.20	\$770,454.20	
			\$ 4,518.78
Deduct:			
8. Debts and Liabilities Certain— Schedule D.....	\$ 25,756.63		
9. Reserves for Taxes—Schedule D.....	\$ 28,175.46		
10. Proportion of Loss and Premium.....	\$ 758.13		
Reserves and Other Liabilities Uncertain— Schedule E.....			\$ 54,690.22
11. Tentative Assessment (Item 7 less sum of Items 8, 9 and 10).....			None
12. Minimum Assessment (15% of sum of Capital and Surplus after deducting Real Estate Assessments and other Tax Exempt and Non-Taxable Securities. Use last annual statement).....			None
13. Intangible Personalty Assessment (Item 11 or 12, whichever is higher).....	None		
14. Tangible Personalty Assessment.....	None		
15. Personal Property Assessment (sum of Items 13 and 14).....			None

[fol. 10]

New Jersey Realty Title Insurance Company

Balance Sheet

September 30, 1944

Assets		
Cash		
General Funds	\$121,024.33	
Trust Funds	11,802.04	
F. H. A. Funds	1,463.36	
S. S. Act and Withholding Tax Funds	2,305.01	\$136,594.74
U. S. Treasury Bonds (at Par)		450,000.00
Bonds and Mortgages Owned—Secured by Real Estate in New Jersey		42,553.00
Bonds and Mortgages Owned—F. H. A. Insured		86,027.48
Accrued Interest:		
Bonds	\$ 1,682.25	
Mortgages	564.84	2,247.09
Accounts Receivable	30,751.47	
Less: Reserve for Accounts Receivable	26,232.69	4,518.78
Title Plant located in Trenton, N. J.		47,500.00
Deferred Commissions		3,933.92
Deposits with County Clerks and Registers		935.00
Internal Revenue Stamps		196.15
Prepaid Personal Taxes		436.82
Total Assets		\$774,972.98

Liabilities, Reserves and Capital

Commissions Payable	\$ 4,410.17
Accounts Payable	2,878.06
Federal Income Taxes Payable	3,298.65
Social Security, Unemployment and Withholding Taxes Payable	2,305.01
Clients Trust Account	11,802.04
F. H. A. Title II Mortgage Escrow Account	1,463.36
Reserve for Title Losses	130,711.79
Reserve for Unearned Premiums	7,427.50
Special Reserve	1,200.00
Reserve for Federal Income Taxes	28,175.46
Capital Stock	250,000.00
Paid in Surplus	250,000.00
Profit and Loss Surplus	81,300.94
Total Liabilities, Reserves and Capital	\$774,972.98

[fol. 11]

Schedule B—Item 5

(Itemize shares of stock giving number, names of companies and book value)

• None $\frac{1}{2}$

Schedule C—Item 6

(Itemize personal property claimed to be exempt, giving dates of purchase thereof, description of securities (other than stocks) with book values thereof, names of New Jersey banks and amounts of deposits therein; list all other personal property claimed to be exempt.)

Bonds owned with accrued interest thereon (see schedule attached)	\$451,682.25
Mortgages owned with accrued interest thereon (see schedule attached)	129,175.32
Deferred Commissions	3,933.92
Cash deposits with County Clerks and Registers (see schedule attached)	935.00
Internal Revenue Stamps	196.15
Title Plant located in Trenton, N. J.	47,500.00
Prepaid Personal Taxes	436.82

Cash on Deposit:

Fidelity Union Trust Company	\$34,987.94	
Lincoln National Bank	3,696.49	
National Newark & Essex Banking Company	15,416.24	
Merchants and Newark Trust Company	41,080.62	
Trenton Trust Company	37,351.13	
Broad Street National Bank, Trenton	4,062.25	136,594.74
		<hr/>
		\$770,454.20

New Jersey Realty Title Insurance Company

Personal Property Tax Return for 1945

Schedule C—Item 6

Date Purchased	Bonds Owned	Rate	Maturity	
June 2, 1941	United States Treasury Bonds	2½%	1958-56	\$ 40,000 00
October 20, 1941	United States Treasury Bonds	2½%	1972-67	62,500 00
May 5, 1942	United States Treasury Bonds	2½%	1962-67	47,940 00
August 6, 1942	United States Treasury Bonds	2½%	Series G	100,000 00
April 28, 1943	United States Treasury Bonds	2½%	1950-52	100,000 00
April 28, 1943	United States Treasury Bonds	2½%	1964-69	100,000 00
				<hr/>
Accrued Interest on above Bonds to				\$450,000 00
October 1, 1944				1,682 25
Total Bonds Owned and Accrued Interest thereon				<hr/>
				\$451,682 25

Schedule D—Items 8 and 9

(Detail debts and liabilities certain and tax reserve)

Federal Income Tax Payable	\$3,298 65
Accounts Payable (see schedule attached)	2,856 46
Commissions Payable (see schedule attached)	4,031 11
Clients' Trust Account (see schedule attached)	11,902 04
Social Security and Unemployment Taxes Payable	2,305 01
F. H. A. Title II Escrow Account	1,463 36
<hr/>	
Total	\$25,756 63
Reserve for Federal Income Taxes	\$28,175 46

Schedule E—Item 10

(List loss and premium reserves and other liabilities not certain and definite as to obligation and amount. Insert as Item 10 that proportion of the total thereof which is the amount of Item 7 divided by the amount of Item 4.)

Reserves for Losses	\$130,711 79
Proportion of the Total of above Reserves which is the amount of Item 7 divided by the amount of Item 4 (.58%)	\$758 13

[fol. 13]

AFFIDAVIT

STATE OF NEW JERSEY,

County of Essex, ss.:

John C. Thompson, President of New Jersey Realty Title Insurance Company being duly sworn, on my oath, depose and say that I am authorized to make and file the foregoing return and execute this affidavit; that this return including the accompanying schedules and statements has been examined by me and is to the best of my knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the General Tax Act of the State of New Jersey (Chapter 4 of Title 54 of the Revised Statutes) and the Regulations issued thereunder. Exemption is claimed for the personal property and securities listed in Schedule C, none of which was purchased to escape taxation.

(signed) John C. Thompson.

Subscribed and sworn to before me this 1st day of December, 1944. Herbert F. Rech, Notary Public of the State of N.J.

[fol. 14] DEPARTMENT OF TAXATION AND FINANCE, DIVISION OF
TAX APPEALS

Report of Commissioners Conklin and Labrecque of cases heard January 16, 1947, at the Court House, Jersey City, New Jersey.

12. N. J. Realty Title Ins. vs. City of Newark Pers. located at the offices of the petitioner, 830 Broad St.

OPINION—Filed April 22, 1947

This is a personal property appeal wherein the petitioner attacks the constitutionality of the assessment. This is not a proper court for the determination of such a question, and therefore it is recommended that the appeal be dismissed.

Walter H. Conklin, Commissioner; Theodore J. Labrecque, Commissioner.

Department of Taxation and Finance

JUDGMENT

A duly verified appeal in writing having been filed with the Division of Tax Appeals, by N. J. Realty Title Insurance Co. in which it is alleged that an injustice has been done the said complainant by the assessment of certain property for taxation for the year 1945, located at City of Newark in the County of Essex consisting of Personalty, at No. 830 Broad St., and that said property is assessed higher than the true value thereof;

After hearing evidence produced on the part of said complainant, and the said respondent, and the argument of Charles B. Niebling, Atty. for the complainant, and Harry Pine, Atty. for the respondent and after considering the same, it is on this twenty-second day of April, nineteen hundred and forty-seven, at a session of the Division of Tax Appeals, ordered, adjudged and decreed, under and by virtue of the authority conferred by law, that the appeal from the assessment levied for the year 1945 on the above described property be and the same hereby is dismissed.

Donald M. Waesche, President; Walter H. Conklin,
W. Leslie Rogers, Chas. H. Frankenbach, Division
of Tax Appeals in the State Department of Taxa-
tion and Finance.

Attest: Chas. E. Cook, Secretary.

[fol. 16] DEPARTMENT OF TAXATION AND FINANCE, DIVISION
OF TAX APPEALS

Transcript of Hearing

Transcript of the testimony taken in the above entitled matter before Division of Tax Appeals, Commissioners Theodore Labrecque and Walter Conklin presiding at the Court House, Newark, New Jersey, on Thursday, January 16th, 1947 at 11:00 A. M.

Appearances

Charles B. Niebling, Esq., for the Petitioner.

Harry Pine, Esq., for the Respondent.

Commissioner Labrecque: You may proceed, gentlemen.

STATEMENT ON BEHALF OF PETITIONER

Mr. Niebling: The petition of appeal of the New Jersey Realty Title Insurance Company seeks cancellation of a personal property assessment of \$75,700.00 made by the City of Newark for the year 1945 on the ground that Chapter 4 Title 54 of the Revised Statutes is unconstitutional in so far as it purports to impose a tax based upon an assessment of not less than 15 percent of the sum of paid up capital and surplus in excess of the total of the company's liabilities.

In that such provision of the taxing statute in effect levies a tax upon non-taxable and exempt securities owned by the petitioner and results in unequal and discriminatory taxation.

The constitutionality of this statute has not been before the courts. I recognize that the Division of Tax Appeals may not undertake to rule upon the constitutionality of an [fol. 17] act of the legislature prior to a decision thereon by the courts under the principle that was cited in the case of Postal Telegraph and Cable Company against Martin, reported in 18 Miscellaneous 567, in which the State Board of Tax Appeals said that it would not pass upon constitutional questions of first impression in advance of their determination by the court.

However, I would like to make a statement for the record of the grounds upon which the petitioner challenges the constitutionality of the statute, and to put in proof of the

property owned by the petitioner made subject to taxation by the statute.

Commissioner Labrecque: All right, you may proceed.
Mr. Niebling: Mr. Anderson.

Hilmer Anderson, sworn as a witness in behalf of the petitioner, testified as follows:

Mr. Pine: Pardon me. It seems to me that inasmuch as it is recognized by the petitioner as well as the City of Newark that this board has no jurisdiction to test the constitutionality of a law passed by the State of New Jersey, I can see no reason at all for the entry of any evidence. It is a question of law, pure and simple. We don't disagree with their figures as rendered in their return. They are accurate and we have made our assessment based on their figures according to the law, not less than 15 per cent of paid in surplus and capital. The whole test is whether or not this [fol. 18] question is properly before this board. And since they themselves admit that you have no jurisdiction to decide it, why should the case be tried?

Commissioner Labrecque: Can't you gentlemen stipulate the factual situation leaving only the legal question involved to be determined?

Mr. Niebling: I would like to make a record both of the question and of the facts for the purpose of proceeding further before the Supreme Court.

Commissioner Labrecque: If you gentlemen are intending to proceed before the Supreme Court, wouldn't you save time and money by assuming that Mr. Pine's statement is correct and their figures are your figures; wouldn't you save time by stipulating those figures and putting them in a form of a written stipulation?

Mr. Pine: I think if they introduce the return that they made to the City of Newark that would be sufficient. I have no objection. I have got lots of time, but I don't see the necessity of it.

Commissioner Labrecque: We are ready to hear any evidence that you have to produce. You are not formally objecting on a legal basis?

Mr. Pine: No. I am merely suggesting that we can save time by the introduction of the same return.

Commissioner Labrecque: Apparently your opponent agrees with your return.

Mr. Niebling: Well, we disagree with the assessment even if made under the proviso of the statute for a minimum assessment in that the wrong figures, were used by the City. [fol. 19] So that I would like to put in that proof and also make a further statement of the grounds for the record.

Commissioner Labrecque: Well, you are the man that is going up, Mr. Niebling. You go ahead and make your own record. There is no formal objection before us.

Mr. Niebling: The statute under which the assessment which is before us was made is 54:4-22 of the Revised Statutes as amended by Chapter 245 of the laws of 1938.

This section sets forth the formula for the taxation of domestic stock insurance companies other than life insurance companies; providing for an assessment by a taxing district where its office is situated upon the full value of the company's intangible personal property exclusive of shares of stock and non-taxable property and property exempt from taxation, after deducting therefrom all debts and liabilities certain, the full reserves for taxes, and such proportion of reserves for unearned premiums, losses and other liabilities as the value of its taxable intangible property bears to the value of all of its intangible property.

The Statute adds the proviso that such assessment shall in no event be less than 15 per centum of the paid-up capital and surplus in excess of the total of all liabilities of the company, as the same are stated in the annual statement of such company for the calendar year next preceding the date of assessment and filed with the Department of Banking and Insurance of New Jersey, after deducting from such total [fol. 20] of capital and surplus the amount of all tax assessments against any and all real estate, title to which stands in the name of such company.

The contention of the petitioner is that the statute is unconstitutional, first, in that the application of the proviso for a minimum assessment operates to impose a direct tax upon bonds of the United States owned by the petitioner which are exempt from state and local taxation under the principle first enunciated by the United States Supreme Court in the case of McCullough against Maryland and in a long line of cases following that decision, and by force of the Act of Congress Title 31 United States Code Annotated in Section 742 providing that stocks, bonds, treasury notes and other obligations of the United States shall be exempt

from taxation by or under state or municipal or local authority.

And secondly, that the statute in subjecting the personal property of stock insurance companies to taxation by a special method of assessment makes an arbitrary classification resulting in unequal and discriminatory taxation in contravention of Article 4 Section 7 Paragraph 12 of the Constitution of New Jersey and the 14th Amendment to the Constitution of the United States.

Direct examination.

By Mr. Niebling:

Q. Mr. Anderson, what is your position with the New Jersey Realty Title Insurance Company?

A. I am Treasurer of the New Jersey Realty Title Insurance Company.

[fol. 21] Q. How long have you been in that capacity?

A. Since its organization June 1st, 1937.

Q. Was the company organized under the insurance laws of the State of New Jersey?

A. It was.

Q. Where is its principal office situated?

A. 830 Broad Street, Newark.

Q. Are you familiar with the assets and liabilities of the company as of October 1, 1944?

A. I am.

Q. And with the assets and liabilities shown in the report or annual statement filed with the Department of Banking and Insurance for the calendar year 1943?

A. Yes.

Q. Did you prepare the return filed with the City of Newark for the 1945 assessment under Section 22, Chapter 4, of Title 54?

A. I did.

Q. Is this a true copy of the return filed with the City?

A. It is.

Mr. Niebling: I would like to offer this and ask that it be marked in evidence.

Mr. Pine: No objection.

Commissioner Labrecque: It may be received and marked P-1.

(The return above referred to by Mr. Niebling was received in evidence and marked Exhibit P-1.)

Q. Is the balance sheet annexed to that return a correct statement of the assets and liabilities of the petitioner as of September 30th, 1944?

A. It is.

Q. What does the return show as to the total assets of the company?

A. Total assets of the company as shown on the return is \$774,972.98.

Q. What is shown as to real estate and tangible personal property?

A. Nothing.

[fol. 22] Q. And as to shares of stock owned by the company?

A. No shares owned by the company.

Q. What is the amount reported for exempt and non-taxable property?

A. \$770,454.20.

Q. And what does that consist of?

A. Bonds owned with accrued interest thereon, \$451,682.25.

Q. What bonds?

A. United States Government Bonds. Bonds and mortgages owned with accrued interest, \$129,175.32.

Commissioner Labrecque: Wouldn't your record be just as complete if your witness said "All the items in Schedule C Item 6 just offered?"

Mr. Niebling: Yes.

Commissioner Conklin: Let's shorten this.

Q. Included in the item for debts and liabilities certain being Item 8 of the return, are there all the items stated in Schedule D?

A. That is correct.

Q. And the Reserve for Federal Income Taxes, is that the figure stated in Item 9?

A. That is correct.

Q. And the proportion of loss and premium, is that the figure stated in Item 10?

A. That is correct.

Q. Now, turning to the annual statement for the calendar year 1943 filed with the Department of Banking and Insurance, what are the total assets of the petitioner shown in that statement?

A. \$758,973.90.

Q. And what is the total capital and surplus of the petitioner shown in that statement?

A. Capital \$250,000.00; paid in surplus, \$250,000.00; earned surplus, \$47,462.93.

Q. A total of \$547,462.93?

A. That is correct.

[fol. 23] Q. What are the total reserves shown in that statement?

A. Total reserves other than for federal income taxes, \$161,047.74.

Q. And of what items does that reserve consist?

Commissioner Labrecque: Do you have a statement of that too that can be offered?

Mr. Niebling: We have only a penciled copy, Commissioner. I have only a few questions to ask on this phase of it.

Commissioner Labrecque: All right.

A. \$161,047.74 includes reserve for unearned premiums, \$15,577.50; voluntary reserve \$100,701.41; statutory reserve \$22,695.23; accounts receivable \$22,073.60.

Q. What other liabilities are shown in that annual statement?

A. Liabilities for accounts payable which includes expenses necessary, bills, \$5,008.99; commissions \$6,339.84; income taxes, old age and unemployment, \$14,337.19; clients funds \$23,627.74; withholding tax payment, \$1,149.47, making the total liabilities \$50,463.23.

Q. Is there a minimum deposit required by the law against title losses for a title insurance company?

A. There is.

Q. How much?

A. \$50,000.00.

Q. What has been required by the Department of Banking and Insurance of the petitioner as a deposit?

A. \$100,000.00.

Q. What would the assessment be if computed on the basis of the total capital and surplus shown on the statement for 1943?

A. \$72,100.00.

Mr. Niebling: That is all, Commissioners.

Commissioner Labrecque: Any questions?

[fol. 24] Mr. Pine: I am interested in just three questions.

Commissioner Labrecque: All right.

Cross examination.

By Mr. Pine:

Q. Referring to your balance sheet as of October 1st, 1944—rather September 30th, 1944; tell us what your capital stock, paid in surplus, profit and loss surplus is?

A. Capital stock \$250,000.00; paid in surplus \$250,000.00; profit and loss surplus, \$81,300.94; total of \$581,300.94.

Mr. Pine: That is all.

Mr. Niebling: Thank you for your indulgence.

Commissioner Labrecque: Any rebuttal?

Mr. Pine: No.

Commissioner Labrecque: All right.

Mr. Pine: Our contention is, Commissioner, that we are entitled to an assessment of a tax of 15 per cent—not less than 15 per cent on their paid in capital stock, surplus and so forth. In other words, the last three items we had answered. They contend it is unconstitutional. So we have nothing to rebut.

Commissioner Labrecque: Do either of you gentlemen feel that you would like to file a memorandum in this matter?

Mr. Niebling: I will be glad to file a memorandum if the Division wishes to consider it and pass upon the constitutionality.

Commissioner Labrecque: Well, that would be a very good subject for your memorandum; whether in your opinion we have the right.

Mr. Niebling: I think we both agree that you do not.

[fol. 25] Commissioner Labrecque: Then you both agree that you don't need to file a memorandum.

Mr. Niebling: May I add in response to what Mr. Pine has just said, that the petitioner's contention is that if the proviso of the statute is valid, the minimum should be based at 15 per cent of the total paid in capital and surplus as shown by the annual statement for the year 1943 and not by the condition of the company as of the assessing date.

Mr. Pine: Very little difference, isn't there, Mr. Niebling?

Mr. Niebling: About \$3,600.00.

(The hearing then closed.)

[fol. 26] IN NEW JERSEY SUPREME COURT, MAY TERM, 1948

No. 271

Argued May 5, 1948; decided July 23, 1948.

On Certiorari.

Before Justices BODINE AND HEHER.

For the prosecutor: Charles B. Niebling.

For the defendant City of Newark: Thomas L. Parsonnet;
Vincent J. Casale, of counsel.

OPINION—Filed July 23, 1948.

The opinion of the court was delivered by Heher, J.

The question for decision is the validity of an assessment for taxation on intangible personal property of prosecutor, a stock insurance company, levied for the year 1945 by the City of Newark under R. S. 54:4-22, as amended by ch. 245 of the Pamphlet Laws of 1938.

The levy was in the sum of \$75,700., or 15% of the sum of the company's paid-up capital and surplus in excess of liabilities and certain reserves for taxes, unearned premiums, losses, and so on. The capital and surplus upon which the assessment was made included on the assessing date bonds issued by the United States in the total sum of \$451,682.25; and it is contended that section 54:4-22, cited *supra*, is "in contravention of the Constitution and laws of the United States," in that the proviso incorporated by the amendment of 1938, cited *supra*, fixing a minimum assessment [fol. 27] ment at the rate of 15% of the paid-up capital and surplus in excess of liabilities, served to impose a direct tax upon the bonds issued by the Federal government included in the capital and surplus account.

Stocks, bonds, Treasury notes, and other obligations of the United States are "exempt from taxation by or under State or municipal or local authority." 31 U. S. C. A., Section 742; R.S. 54:4-3. *Vide Howard Savings Institution v. Newark*, 63 N. J. L. 547. The exemption does not now extend to interest upon obligations, or dividends, earnings, or other income upon shares, certificates, stock, or other evidences of ownership, or gain from the sale or other disposition of such obligations and evidences of ownership

issued on or after March 28th, 1942, by the United States or any agency or instrumentality thereof. Ch. 147 of the Public Laws of 1947; 61 Stat. 180; 31 U. S. C. A., section 742a.

The tax imposed by section 54:4-22, as amended, is not an excise, but an *ad valorem* tax on personal property. It is comprehended under this heading in the Revised Statutes. The tax is levied "upon the full amount or value" of the company's property (exclusive of real estate and tangible personal property, which are to be separately assessed and taxed where located, all shares of stock owned by the company, and nontaxable and exempt property), less "all debts and liabilities certain and definite as to obligation and amount," and all reserves for taxes and a fixed proportion of the reserves for "unearned premiums, losses and other liabilities;" *provided* the assessment against the "intangible personal property" shall "in no event be less than 15% of the sum of the paid-up capital and surplus in excess of the total of all liabilities of such company," as [fol. 28] stated in the company's annual statement for the preceding calendar year filed with the State Department of Banking and Insurance, after deduction "from such total of capital and surplus" of the amount of all tax assessments against real estate standing in the company's name.

Thus there is no specific provision here for the exclusion of stocks, bonds, and other obligations of the United States from the base paid-up capital and surplus in the calculation of the statutorily fixed minimum assessment on intangible personal property; but this provision and section 54: 4-3 are *in pari materia* and are therefore to be construed and effectuated as one enactment. So viewed, the legislative command is to exclude the Federal securities in reckoning the capital and surplus upon which the tax is assessable. It was not within the State legislative province to nullify the exemption from taxation of Federal obligations of this class arising from Federal law. If 15% minimum assessment imposes, as it does here, what is in fact a tax upon the exempt Federal securities, it is in contravention of Federal law and therefore invalid. It is not to be presumed that the Legislature intended to exceed its powers; quite the contrary. To tax the fund composed of exempt property is to tax such exempt property itself. *Newark City Bank v.*

Newark, 30 N. J. L. 13; *Fidelity Trust Co. v. Board of Equalization of Taxes*, 77 N. J. L. 128. A statute is to be construed as a whole with reference to the entire system of which it forms a part, and effectuated in accordance with what reasonably seems to be the legislative intention. Statutes constituting a system should be so construed as to make the system consistent in all its parts and uniform in [fol. 29] its operation. *Lewis' Sutherland Statutory Construction* (2 ed.) section 443. This interpretive principle was applied in the analogous case of *Federal Trust Co. v. Board of Equalization of Taxes*, *supra*. A construction should be adopted which, if reasonable, will uphold the enactment rather than one which will defeat it.

And, even though the legislative intention be otherwise, the particular invalid provision is severable and the remainder stands unimpaired; and so the sum of the Federal securities is deductible from the amount of capital and surplus in the ascertainment of the minimum tax. There is not that interdependence of provision which invalidates the whole. There is no hint of the indissoluble connection in legislative intent which would raise the inference that the legislative authority would not have enacted the one without the other. The excision of the invalid part of the statute under review, if such it be, will advance the essential legislative intent. The limitation thus imposed is a minor deviation which obviously is not of the essence of the statutory scheme and inseparable from it so that failure of the one provision in part would serve to nullify the whole enactment. The acceptance of the contrary view would frustrate the legislative will; and this is not of the judicial function.

The judgment of the Division of Tax Appeals sustaining the assessment is reversed; and the cause is remanded for further proceedings not inconsistent with this opinion.

[fol. 30] IN NEW JERSEY SUPREME COURT

No. 271 MAY TERM, 1948

RULE REVERSING JUDGMENT

The Court having examined the record of the assessment made by the taxing district of the City of Newark for the year 1945 against the personal property of the prosecutor, New Jersey Realty Title Insurance Company, situated at 830 Broad Street, in said City of Newark, and the transcript of proceedings of the Division of Tax Appeals in the Department of Taxation and Finance on the appeal of prosecutor from said assessment, returned with the writ of certiorari in this cause, and the reasons for reversing the judgment below, and having heard the argument of counsel thereon and having duly considered the same, and having determined by the opinion of the Court filed herein on July 23, 1948 that the said judgment should be reversed and this cause remanded to the said Division of Tax Appeals for further proceedings not inconsistent with said opinion;

It is, on this 3rd day of August, 1948, ordered, that the said judgment of the Division of Tax Appeals be reversed, set aside and vacated, and that this cause be remanded to the Division of Tax Appeals to fix the amount of the personal property tax assessment for the year 1945 against prosecutor in accordance with said opinion.

Rule entered this 3rd day of August, 1948.

On Motion of Charles B. Niebling, Attorney for Prosecutor.

[fol. 31] IN NEW JERSEY COURT OF ERRORS AND APPEALS

NOTICE AND GROUNDS OF APPEAL

*To: Charles B. Niebling, Esquire,
Attorney for Prosecutor-Appellee.*

Please Take Notice that the Appellant, The City of Newark, a municipal corporation of the State of New Jersey, appeals to the New Jersey Court of Errors and Appeals, from the judgment entered in the New Jersey Supreme Court, for the reason that the latter court erred in giving judgment in favor of the Prosecutor-Appellee,

New Jersey Realty Title Insurance Company, instead of to the Defendants-Appellants, Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey and the City of Newark.

Thomas L. Parsonnet, Attorney for and Of Counsel
with Defendant-Appellant, the City of Newark.

Dated: August 19, 1948, Newark, N. J.

Service of copy of within Grounds of Appeal is hereby acknowledged this 19th day of August, 1948.

Charles B. Niebling, Attorney for Prosecutor-Appellee.

[fol. 32] IN SUPREME COURT OF NEW JERSEY, SEPTEMBER
TERM, 1948

No. A 222

NEW JERSEY REALTY TITLE INSURANCE COMPANY, Prosecutor-
Respondent

v.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION
AND FINANCE OF THE STATE OF NEW JERSEY AND THE CITY
OF NEWARK, a Municipal corporation, Defendants-Appel-
lants.

Argued January 31, 1949; decided March 7, 1949.

On appeal from the former Supreme Court, whose opinion is reported in 137 N.J.L. 444.

Mr. Vincent J. Casale, argued the cause for the appellant, the City of Newark; Mr. Thomas L. Parsonnet, on the brief.

Mr. Charles B. Niebling, argued the cause for the prosecutor-respondent.

A brief, amicus curiae, was filed by leave of the Court, by the Cities of Camden, Mr. John J. Crean and Mr. Norman Heine, attorneys, and Trenton, Mr. Louis Josephson, attorney.

OPINION—FILED MARCH 7, 1949

The opinion of the Court was delivered by

OLIPHANT, J.:

This appeal is from the former Supreme Court which on certiorari, reversed a judgment of the Division of Tax Appeals sustaining an assessment levied on the property of respondent pursuant to R. S. 54:4-22. The decision of the former Supreme Court was rested on the ground that the tax was not an excise tax, but an ad valorem tax on personal property, and that by taxing a fund composed of exempt property, in this case obligations of the United States which are exempt from state, municipal or local taxation under 31 U.S.C.A., Sec. 742 and R. S. 54:4-3, is to tax such exempt property. We are not in accord with this interpretation of [fol. 33] the statute.

The respondent is a stock insurance company subject to taxation under the cited statute, R. S. 54:4-22, *supra*.

The statute requires that the property of such companies, other than life insurance companies, shall be assessed and taxed in the taxing district where its office is situated, upon the full value of its property at the local rate and by the following formula.

There shall be excluded from the value of its property the following property: (a) Real estate and tangible property (which are taxed at the situs by general law); (b) all shares of stock owned by the company; (c) nontaxable property (which includes United States government securities which the state has no power to tax as such); (d) property exempt from taxation under the law of this state.

After excluding the above classes of property, there is deducted from the value of its property so found to be taxable the following items or debits (1) all debts and liabilities certain and definite; (2) the full amount of all reserves for taxes; (3) such proportion of the reserves for unearned premiums, losses, or other liabilities as the full amount of value of its taxable intangible property bears to the full amount and value of *all its intangible property*.

The arithmetical result produced by the application of the formula at this point is subject to the following controlling proviso which is integrated into the formula as a whole, that the assessment calculated under such formula shall in no

event be less than 15 percent of the paid up capital and surplus in excess of all liabilities of the insurance company as [fol. 34] the same are stated in the company's annual statement for the calendar year next preceding the assessing date and filed with the Department of Banking and Insurance, less the amount of the tax assessments against real estate owned by the company.

The total assets of the respondent as shown by its return were \$774,972.98 which included the following items which were ~~excluded~~ under the formula, exempt property \$461,682.25, mortgages on New Jersey real estate \$129,175.32; title plant \$47,500.00, cash on deposit \$136,594.74; other cash items and prepaid charges \$5,981.89, making a total of excludable property of \$770,454.20, which left a total of taxable intangibles of \$4,583.78. The deduction for debts and liabilities, certain tax reserves and proportionate loss of reserves was \$54,690.22 which left no balance of assessable property subject to tax at the local rate.

The respondent's capital stock and surplus on the assessing date as shown by its annual statement for the calendar year 1943 filed with the Department of Banking and Insurance totaled \$547,462.93. The assessment placed upon the net worth of the respondent by the city assessor of Newark was \$75,700.00.

The point made by the appellant city is that the tax imposed by R. S. 54:4-22 as amended by P. L. 1938, Chap. 245 is not an ad valorem tax against the property of the respondent, as was found by the Supreme Court.

It is well settled that a state has no power to assess against a corporation a tax which is essentially a property or income tax (whether it purports to be laid directly upon property or upon capital stock) as distinguished from franchise, privilege or excise taxes without allowing a deduction for sums invested in securities of the United States or from [fol. 35] income derived from such sources. 51 Amer. Juris., sec. 797 and the cases cited there.

But it is equally well settled that a state has the power to levy a tax on a legitimate subject, such as corporate franchises or property, measured by net assets or income, even though there is included, in the measure of the tax, tax-exempt federal instrumentalities or the income derived therefrom. A state tax so measured is not an infringement of the immunity from taxation. *Educational Films Corp.*

v. *Ward*, 282 U. S. 379, 75 L. Ed. 400, 51 Sup. Ct. 176; *Tradesmens National Bank v. Oklahoma Tax Commission*, 300 U. S. 560, p. 564; 84 L. Ed. 947, p. 951, 60 Sup. Ct. 688.

We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income.

The respondent contends that the case of *Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 74 L. Ed. 870, 50 Sup. Ct. 326, is controlling. The Court in that case held that where the statute discloses a purpose as a general rule to omit from taxation sufficient assets of the insurance company to cover their legal reserve and unpaid policy claims and it is competent for the state to permit a less reduction or none at all, then where the ownership of United States bonds is made the basis of denying the full exemption which is accorded those who own no such bonds, this amounts to an infringement of guaranteed freedom from taxation. We do not think this case is controlling in the present situation.

[fol. 36] As we read R. S. 54:4-22 as amended, it does not tax the capital or surplus as such. The proviso in the statute simply fixes a floor below which the assessment under the formula is not permitted to go. In the operation of the formula an assessment in excess of 15 percent of the sum of paid-up capital and surplus is possible and when so found is taxable at the local rate. However when a minus sum is the result of the operation of the formula then the assessment is recalculated and the exclusions and deductions are accordingly reduced so as to produce an assessment against the intangible property which is not less in amount than 15 percent of the paid-up capital and surplus.

In the *Gehner* case, supra, it is true that similar exclusions and exemptions were established by state law and that the legislature reserved the right to alter or change these exemptions by law but in the formula set up in the Missouri statute the exemptions, exclusions and deductions were, for the purpose of arithmetical calculation, fixed factors which had the effect of throwing the weight of the tax onto the tax exempt federal securities to the point of discrimination. Compare *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 112, p. 120, 80 L. Ed. 91, 56 Sup. Ct. 31.

Such is not the situation presented by R. S. 54:4-22. While it is true that the legislature authorizes that certain prop-

erty shall be excluded and exempted from the assessment and also permits certain other deductions and that our legislature, in the exercise of its reserve power, may alter or change any and all such items, they are not at the point of assessment fixed factors in the arithmetical taxing formula but are variable factors, because the legislature went one step further by the proviso which authorizes that these [fol. 37] various items shall be accordingly reduced with the ultimate purpose to produce an assessment of the net worth of all the intangible property of the insurance company which in the aggregate may not be less in amount than 15 percent of the paid-up capital and surplus as defined by the statute. The assessment may equal or exceed 15 percent of the paid-up capital and surplus, and does not necessarily have to be precisely the same, but it can not be less in amount than 15 percent of the paid-up capital and surplus.

The tax assessor under the law is required to apply the statute without any discrimination and in such a way that there is no infringement of the constitutional immunity. Compare *Macallen Co. v. Mass.*, 279 U. S. 620, 73 L. Ed. 874, 49 Sup. Ct. 432; *Miller v. Milwaukee*, 272 U. S. 713, 71 L. Ed. 487, 47 Sup. Ct. 280; *Educational Films Corp. v. Ward*, supra; *Pacific Co. v. Johnson*, 285 U. S. 480, 76 L. Ed. 893, 52 Sup. Ct. 424.

If the assessment is made without discrimination then it makes no difference whether the corporate property which is the result of the tax may chance to include federal exempt securities. The constitutional power of one government to reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp. v. Ward*, supra, at 389.

This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be. The statute is not designed to tax capital or surplus as such or any assets alleged to be included [fol. 38] therein. The proviso in question merely fixes, as stated, a floor below which the assessment on the intangible property representing net worth shall not be permitted to go. The statute being subject to the constitutional prohibition against discrimination with respect to federal securities contains a sufficient standard to meet the test set forth in

Gaines v. Hudson County Assessors, 37 N.J.L. 12 (Sup. Ct. 1873); *City of Hoboken v. Martin*, 123 N.J.L. 442 (E. & A., 1939).

The tax assessor is not granted an unlimited discretion. It is perfectly obvious that as a practical matter the legislature could not fix a detailed standard regulating the manner by which the exclusions, exemptions and deductions should be scaled down, which standard could operate with precision under all the possible variations that could be presented in the corporate organization, investment portfolios, properties owned and policy liabilities of the stock insurance companies subject to taxation under the act.

The judgment of the former Supreme Court is reversed and that of the Division of Tax Appeals affirmed.

[File endorsement omitted.]

v

[fol. 39] IN SUPREME COURT OF NEW JERSEY

Appeal Docket No. A222

Civil Action on Appeal

NEW JERSEY REALTY TITLE INSURANCE COMPANY, Prosecutor-
Respondent,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION
and Finance of the State of New Jersey and the City of
Newark, a municipal corporation, Defendants Appellants.

MANDATE ON REVERSAL—Filed March 7, 1949

This cause having been duly argued before this Court by Vincent J. Casale, counsel for the appellant, City of Newark, and Charles B. Niebling, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said former Supreme Court is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and

that the record and proceedings be remitted to the said Superior Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 7th day of March, 1949.

Charles K. Barton, Clerk of the Supreme Court.

[fol. 40] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

DOCKET ENTRIES

Grounds of Appeal, August 23, 1948.
 Return, August 24, 1948.
 Proof of Service, December 1, 1948.
 Proof of Service, December 7, 1948.
 Motion Check List, December 13, 1948.
 Proof of Service, January 20, 1949.
 Proof of Service, January 27, 1949.
 Opinion of Reversal by Oliphant, J., March 7, 1949.
 Mandate, March 7, 1949.
 Record Remitted to Superior Court, March 25, 1949.
 Order Allowing Appeal, June 6, 1949.
 Affidavit, June 6, 1949.
 Petition, June 6, 1949.
 Citation, June 6, 1949.
 Statement as to Jurisdiction, June 6, 1949.
 Statement, June 6, 1949.
 Proof of Service, June 8, 1949.
 Bond, June 14, 1949.
 Praecept, June 14, 1949.

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE
OF NEW JERSEY TO THE SUPREME COURT OF THE UNITED
STATES, ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

To the Honorable Harold H. Burton, Associate Justice of
the Supreme Court of the United States:

Comes now New Jersey Realty Title Insurance Company,
a corporation, appellant in the above-entitled cause, by its
attorneys and respectfully shows:

1. On or about December 13, 1945, petitioner filed a petition of appeal to the Division of Tax Appeals, in the Department of Taxation and Finance of the State of New Jersey, from an assessment of \$75,700.00 levied by the City of Newark for the purpose of taxation on personal property, including United States Treasury Bonds, owned by petitioner, situate in the said city, County of Essex, State of New Jersey, for the year 1945.

[fol. 42] 2. By judgment dated April 22, 1947, the said Division of Tax Appeals dismissed the said appeal.

3. On Writ of Certiorari to the New Jersey Supreme Court (established under the constitution and laws of New Jersey then in force), the said court on August 3, 1948 entered a judgment reversing the judgment of the Division of Tax Appeals and ordering that the cause be remanded to the Division of Tax Appeals to fix the amount of the personal property tax assessment for the year 1945 in accordance with the court's written opinion.

4. An appeal from said judgment of the former New Jersey Supreme Court was taken to the Supreme Court of New Jersey (established under the constitution and laws of New Jersey now in force).

5. On said appeal the Supreme Court of New Jersey, which is the highest court of said state, reversed the judgment of the former Supreme Court and affirmed the judgment of the Division of Tax Appeals. The judgment of the Supreme Court of New Jersey was entered March 7, 1949.

6. In all of the foregoing proceedings there was drawn in question by petitioner the validity of the statute of the

State of New Jersey pursuant to which the aforementioned assessment was levied, namely, Title 54, Chapter 4, Section 22 of the Revised Statutes of New Jersey, as amended in 1938 (R.S. Cum. Supp. 54:4-22), which said statute, as so amended, is sometimes referred to as R.S. 54:4-22, on the ground of its being repugnant to the Constitution of [fol. 43] the United States and to Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742), in so far as applied to authorize the assessment upon the United States Treasury Bonds held by petitioner. The decision and judgment of the Supreme Court of New Jersey are in favor of the validity of the said state statute as so applied, and, greatly to petitioner's damage, are against the rights and exemptions claimed by petitioner under the Constitution and said law of the United States and under decisions of the Supreme Court of the United States construing the same.

As will appear further from the Assignment of Errors next hereinafter set forth, petitioner contends that the said statute of New Jersey as so applied and upheld, and the assessment thereunder, violate Article I, Section 8, clause 2, and the supremacy clause of Article VI, paragraph 2, and the due process clause of Amendment XIV, Section 1, of the Constitution of the United States, in that they impair and contravene the power of Congress to borrow money on the credit of the United States, infringe the constitutional command that the Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land, and deprive petitioner of property without due process of law; and violate Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742) and the said supremacy clause, in that they tax bonds of the United States.

[fol. 44]

ASSIGNMENT OF ERRORS

Said New Jersey Realty Title Insurance Company, appellant in the above-entitled cause, assigns the following errors in the record and proceedings of said case:

1. The Supreme Court of New Jersey erred in holding and deciding that Title 54, Chapter 4, Section 22 of the Revised Statutes of New Jersey, as amended in 1938 (R.S.

7 Cum. Supp. 54:4-22)—which said statute as so amended was referred to in said court's opinion as R.S. 54:4-22—did not violate Article I, Section 8, Clause 2 of the Constitution of the United States in so far as said statute was applied to authorize the tax assessment by the City of Newark for the year 1945 on property of appellant without excluding the United States Treasury Bonds held by appellant from the property so assessed.

2. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate the supremacy clause contained in the second paragraph of Article VI of the Constitution of the United States in so far as said statute was applied to authorize the said tax assessment on appellant's property without excluding said United States bonds from the property so assessed.

3. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742) in so far as said state statute was applied to authorize the said tax assessment on ap-[fol. 45] pellant's property without excluding said United States bonds from the property so assessed.

4. The Supreme Court of New Jersey erred in failing to hold and decide that, by virtue of Article I, Section 8, Clause 2, and the supremacy clause of Article VI of the Constitution of the United States, the said United States bonds could not validly be included as part of appellant's paid-up capital or surplus in computing the assessment under the proviso clause of the said statute of New Jersey.

5. The Supreme Court of New Jersey erred in failing to hold and decide that Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742), in conjunction with the supremacy clause of Article VI of the Constitution of the United States, prohibited the said United States bonds from being included as part of said capital or surplus of appellant in computing said assessment.

6. The Supreme Court of New Jersey erred in holding and deciding that the tax assessed under the authority of the said statute was not an ad valorem or property tax within the scope of the decisions of the Supreme Court of the United States holding that United States bonds are

exempt from such tax by or under state, municipal or local authority.

7. The Supreme Court of New Jersey erred in failing to hold and decide that the said statute of New Jersey, in [fol. 46] so far as applied to authorize the City of Newark to levy said assessment on said United States bonds, violated Section 1 of the Fourteenth Amendment of the Constitution of the United States by depriving petitioner of its property without due process of law.

8. The Supreme Court of New Jersey erred in reversing the judgment of the former New Jersey Supreme Court.

PRAYER FOR REVERSAL

Wherefore, petitioner, by its attorneys, prays for the allowance of an appeal from said Supreme Court of New Jersey, the highest court of said state, to the Supreme Court of the United States, in order that the decision and judgment of said Supreme Court of New Jersey, dated March 7, 1949, be reversed and that a judgment be rendered in favor of petitioner herein, and for costs.

Dated: May 31, 1949.

Walter Gordon Merritt, Charles B. Niebling, H.
Gardner Ingraham, Attorneys for Appellant.

[fol. 47] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 6, 1949

The appellant in the above-entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in this cause by the Supreme Court of the State of New Jersey on the 7th day of March, 1949, and having presented its Petition for Appeal, Assignment of Errors, Prayer for Reversal and Statement as to Jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United

States from the Supreme Court of the State of New Jersey in the above-entitled cause, as provided by law, and it is further

Ordered that the Clerk of the Supreme Court of the State [fol. 48] of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within 40 days of this date, and it is further

Ordered that security for costs on appeal be fixed in the sum of \$250.00.

Dated: June 2nd, 1949.

(s.) Harold H. Burton, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

[fols. 49-52] Citation in usual form, filed June 6, 1949, omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES

[Title omitted.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Supreme Court of the State of New Jersey:

New Jersey Realty Title Insurance Company, appellant in the above-entitled cause, by its attorneys, hereby requests you to make and transmit to the Supreme Court of the United States in compliance with Rule 10, paragraph 2 of the Rules of said court, a transcript of record for use on the appeal which has been allowed to said court from the Supreme Court of the State of New Jersey; and, pursuant to said Rule, hereby indicates and requests that the following portions of the record be incorporated into the said transcript:

1. Each and every portion of the record printed in the [fol. 54] "Appendix to Appellants' Brief" in the Supreme Court of New Jersey, which appendix constituted and was used as the printed record on appeal in the Supreme Court of New Jersey in the cause therein entitled "New Jersey

Realty Title Insurance Company, Prosecutor-Respondent,
 vs. Division of Tax Appeals in the Department of Taxation
 and Finance of the State of New Jersey and the City of
 Newark, a municipal corporation, Defendants-Appellants."'
 Appeal Docket No. A222, September Term, 1948.

2. Opinion of Supreme Court of New Jersey, filed March
 1949.

3. Mandate on Reversal (judgment) of Supreme Court
 of New Jersey, filed March 7, 1949.

4. The docket entries of the Supreme Court of New
 Jersey.

5. Petition for Appeal from the Supreme Court of New
 Jersey to the Supreme Court of the United States, Assign-
 ment of Errors and Prayer for Reversal.

6. Statement As To Jurisdiction.

7. Order Allowing Appeal to the Supreme Court of the
 United States.

8. Citation.

9. Affidavit of Charles B. Niebling.

10. Statement Under Rule 12, Paragraph 2(b) of the
 Rules of the Supreme Court of the United States.

[Fols. 55-56] 11. Proof of Service of foregoing items 5
 through 10, inclusive.

12. Cost on Appeal Bond.

13. This Praecipe, with Acknowledgments of Service
 hereof.

Dated: June 10, 1949.

Walter Gordon Merritt, Charles B. Niebling, H.
 Gardner Ingraham, Attorneys for Appellant, %
 McLanahan, Merritt & Ingraham, 40 Wall Street,
 New York 5, N. Y.

ACKNOWLEDGMENTS OF SERVICE.

Receipt of a copy of the foregoing praecipe by the below-named appellee is acknowledged this 14th day of June 1949.

Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey, by:
/s/ Chas. E. Cook, Secretary; /s/ by Helen Heher.

Receipt of a copy of the foregoing praecipe by the undersigned is acknowledged this 14th day of June 1949.

/s/ Charles Handler, Counsel for the appellee, City of Newark, a municipal corporation.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 7, 1949.

1. Comes now the Appellant in the above-entitled cause and for its statement of the points on which it intends to rely in its appeal to this Court adopts the points contained in its Assignment of Errors heretofore filed herein.

2. Appellant herein designates all portions of the record as being necessary for the consideration of the points herein relied upon, except the Affidavit of Charles B. Niebling and the Cost on Appeal Bond.

Dated: June 27, 1949.

New Jersey Realty Title Insurance Company, Appellant, by its Attorneys, Walter Gordon Merritt, Charles B. Niebling, H. Gardner Ingraham.

[fol. 59] ACKNOWLEDGMENTS OF SERVICE

Service of the foregoing Statement of Points to Be Relied Upon and Designation of the Parts of the Record to Be Printed is hereby acknowledged this 29th day of June, 1949.

Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey, by
Charles E. Cook, Secretary.

Service of the foregoing Statement of Points to be Relied upon and Designation of the Parts of the Record to be printed is hereby acknowledged this 6th day of July, 1949.

Charles Handler, Attorney for the Appellee City of Newark, a municipal corporation.

fol. 60] [File endorsement omitted.]

fol. 61] SUPREME COURT OF THE UNITED STATES.

ORDER NOTING PROBABLE JURISDICTION—October 10, 1949.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

fol. 62] Endorsed on Cover: File No. 53,896, New Jersey, Supreme Court, Term No. 147. New Jersey Realty Title Insurance Company, Appellant, *vs.* Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey and the City of Newark. Filed June 28, 1949, Term No. 147 O. T. 1949.

(4761)